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No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM ARTHUR WIDGERY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the petitioner was denied his right to a fair trial when the prosecution did not disclose material evidence favorable to the defense and knowingly used perjured testimony from its key witness to obtain a conviction.

2. Whether an incorrect standard of review, in direct conflict with other circuit courts of appeal, was applied in evaluating petitioner's motion for new trial on the grounds of perjured testimony of a key government witness, under Rule 33 of the Federal Rules of Criminal Procedure.

3. Whether petitioner was entitled to an evidentiary hearing in connection with his motion for new trial where he alleged the denial of his right to a fair trial in the prosecution's suppression of exculpatory evidence and knowing use of perjured testimony.

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UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner William Arthur Widgery respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 31, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, App. 1a-6a.

The United States District Court for the Western District of Missouri rendered an original opinion on February 11, 1981, not yet reported, which is reproduced in the Appendix hereto, App. 8a-15a; and the District Court rendered a second opinion (subsequent to remand from the Eighth Circuit Court of Appeals) on June 26, 1981, not yet reported, which appears in the Appendix hereto, App. 16a-21a.

An opinion by the United States Court of Appeals for the Eighth Circuit, rendered at a prior stage of the present proceedings is reported at 636 F.2d 200 (8th Cir. 1980).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 31, 1982. A timely petition for rehearing was denied on May 6, 1982. See App. 7a, *infra*. An application for extension of time within which to file this petition for certiorari was timely filed and approved on June 21, 1982, extending the time for filing this petition to and including August 4, 1982. This petition for certiorari was filed within the time presented.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and Rule 20.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND RULES

Fifth Amendment, United States Constitution:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . .

Federal Rules of Criminal Procedure, Rule 33, 18 U.S.C.A.:

> **New Trial**
>
> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending

the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

On October 4, 1979, petitioner, William Arthur Widgery was charged in a twenty-eight count indictment filed with the United States District Court for the Western District of Missouri with mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 (1976). The indictment alleged in essence that petitioner had submitted fraudulent purchase orders for car washing equipment to Robo Wash, Inc., a Missouri corporation, which in turn used them as security for bank loans.

After a trial by jury, on January 27, 1980, petitioner was convicted of ten counts and acquitted of eighteen counts of the indictment. On May 9, 1980, petitioner, a 43 year old businessman with no prior criminal history, was sentenced to a term of five years imprisonment on each count and a $500.00 fine on each count, the sentences to be served concurrently. An appeal was taken to the United States Court of Appeals for the Eighth Circuit, which affirmed convictions on eight of the ten counts and set aside the convictions on two of the counts for want of sufficient evidence. *United States* v. *Widgery*, 636 F.2d 200 (8th Cir. 1980).

On December 29, 1980, petitioner filed a motion for new trial on grounds of newly discovered evidence. That motion and supplements[1] thereto resulted in denials of peti-

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[1] The appeal was remanded to the District Court upon petitioner's motion for supplementation with additional evidence. Thus the District Court issued two opinions denying the motion.

tioner's new trial motion in the District Court and in the Eighth Circuit Court of Appeals.

During the period covered by the indictment, Robo Wash was engaged in the manufacture and sale of automatic car washing equipment. Robo Wash maintained a network of distributors throughout the country who sold and serviced Robo Wash equipment. The president of Robo Wash was Mr. Braxton Jones, who was directly in charge of its day to day activities. In early 1977, Robo Wash was in serious financial difficulty and was in default on a large outstanding loan from Goppert Bank of Kansas City, Missouri. Mr. Jones handled all of the financial transactions with Goppert Bank for Robo Wash.

In February of 1977, Robo Wash solicited petitioner to act as a distributor and to provide managerial and administrative advice in the hope that he could reverse the deteriorating financial condition of the company. An agreement was reached whereby petitioner was to generate a profit for Robo Wash so that its tax return for the fiscal year ending September 30, 1977, would show a before-tax profit on line 28 (of its corporate tax return) of $135,000, or petitioner would agree to pay the difference.[2] In return, petitioner was to receive a large block of lettered Robo Wash stock.

Robo Wash's financial plight was so severe during this time that it could not keep inventory on hand to service orders. In addition, it did not keep the parts on hand necessary to manufacture the equipment to fill the orders. When an order was received by Robo Wash,

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[2] The figure of $135,000 was designated because Robo Wash had a loss carry forward of $135,000 that it would lose if it were not exercised in the taxable year ending September 30, 1977.

Braxton Jones prepared an invoice and sight draft and took them to the Goppert Bank and obtained financing, using the invoice and sight draft as security. The funds were then used to purchase the parts to manufacture the equipment. Usually, this resulted in a three to six month delay between receipt of an order and delivery of the equipment.

During the late summer and early fall of 1977, petitioner submitted three purchase orders to Robo Wash for equipment totalling approximately $197,000. Braxton Jones took the three orders submitted by petitioner to the Goppert Bank and obtained loans totalling $145,000 using the orders as security. In late February of 1978, the Goppert Bank terminated its arrangement with Robo Wash and called all Robo Wash loans due. Robo Wash defaulted on the loans, and the equipment ordered by petitioner's customers was never delivered, and the sales never completed.

At the trial of petitioner, the government alleged that the orders submitted by Mr. Widgery were bogus. The government contended that petitioner's motive for submitting fraudulent purchase orders was to comply with the terms of the agreement to generate $135,000 profit on the Robo Wash tax return. The chief prosecution witness supporting this position was Braxton Jones. Mr. Jones testified at length about the financial relationship between Robo Wash and the Goppert Bank, and presented it as a correct business relationship in which he had unwittingly used bogus orders submitted by the petitioner.

Petitioner's position at trial was that the orders he submitted were legitimate, although contingent upon financing. Two of the orders were contingent upon financing by the Small Business Administration and the third

by a Florida savings and loan bank. Petitioner further contended that Mr. Jones knew of the contingencies associated with these orders; and the "fraud" that was perpetrated occurred when Mr. Jones submitted the invoices on those orders to the bank as security for loans without explaining to the bank the contingencies of which he was directly aware.

Subsequent to the trial, petitioner discovered new evidence that established Braxton Jones had defrauded Goppert Bank on a number of loan transactions totally unrelated to petitioner. Thus, Jones had a motive to commit perjury in order to implicate petitioner and exculpate himself from any wrongdoing. Indeed, petitioner proffered newly discovered evidence that showed more than twenty incidents where Jones had committed perjury at trial. One of the key areas of new evidence related to evidence that Braxton Jones had obtained a $40,000 loan from Goppert Bank on November 2, 1977, as a result of submitting an invoice from a Jurgens Vrooman, Inc. in Beatrice, Nebraska when there was no such order or sale. Mr. Jones had submitted a phony invoice and sight draft in the amount of $48,544.93 for Robo Wash equipment to Jurgens Vrooman; no sale had ever been completed and no purchase order had ever been transmitted to Robo Wash. Further, petitioner submitted evidence in support of his new trial motion that the government was notified of this fraudulent transaction nearly two years before his trial; an officer of Goppert Bank signed an affidavit reporting the circumstances of the fraudulent Jurgens Vrooman transaction to the F.B.I. office in Kansas City on March 30, 1978.

Another key area that petitioner was able to develop to substantiate perjured testimony on the part of Jones related to the before-tax profit of Robo Wash for the

taxable year ending September 30, 1977. In support of his testimony that Widgery's motive for submitting bogus purchase orders was to meet the $135,000 requirement of the agreement, Jones testified that Robo Wash did not make a profit for the taxable year ending 1977. The tax return was never produced at trial. When the tax return did surface after the trial, it established that Robo Wash had a line 28, before-tax profit of nearly $500,000!

Petitioner presented evidence of the Jurgens Vrooman fraud, the government's knowledge of the fraud and the tax return to the District Court in a motion for new trial and requested an evidentiary hearing. The District Court determined that an evidentiary hearing was unwarranted and denied the motion for new trial. The Court of Appeals affirmed. See pp. 1a, 3a of Appendix hereto.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Represents A Significant Departure From Prior Supreme Court Holdings Interpreting The Constitutional Requirement Of Due Process.

Petitioner's right to a fair trial under the due process clause of the Fifth Amendment was violated where the government used perjured testimony and failed to disclose at trial certain material evidence favorable to the petitioner in violation of *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giglio* v. *United States*, 405 U.S. 150 (1972).

This Court has made it abundantly clear since deciding *Mooney* v. *Holohan*, that the prosecutor's knowing and intentional use of perjured testimony in obtaining a conviction violates a defendant's due process rights and denies him a fair trial. 294 U.S. at 112.

The Eighth Circuit has *not* challenged petitioner's basic premise that the key government witness, Braxton Jones, gave perjured testimony at trial to conceal his own criminal activities. The Eighth Circuit did find that the petitioner's evidence that the government had knowledge of the perjury was insufficient, holding that: "The district court found, and we agree, that the evidence relating to the government's knowledge of the alleged perjury is based on speculation and conjecture." See p. 4a of Appendix hereto.

The Eighth Circuit, though conceding petitioner's newly discovered evidence showed "that the bank [Goppert] reported the circumstances of the fraudulent transaction [Jurgens Vrooman] to the F.B.I. office in Kansas City on March 30, 1978" (see p. 4a of Appendix hereto), does not acknowledge that the F.B.I. is part of the prosecution team and that knowledge possessed by this investigative arm of the prosecution can be imputed to the prosecutor.

The Eighth Circuit felt that for there to be "governmental corruption of the truth finding process resulting in a deprivation of fundamental due process", there must be "specific instances of prosecutorial misconduct, such as the use of perjured testimony." See p. 4a of Appendix hereto. The Eighth Circuit approves the District Court's statement that: "the record in this case, as well as defendant's present motion, is utterly devoid of any evidence that *counsel for the government* actually knew or should have known that Braxton Jones' testimony might be perjured." (emphasis added) See p. 12a of Appendix hereto. The Eighth Circuit has misconstrued the case law from this Court and other controlling precedents in reaching its erroneous conclusion.

This Court initially expanded the *Mooney* standard in *Alcorta* v. *Texas*, 355 U.S. 28 (1957), by holding the

prosecutor's knowing failure to correct inculpatory, perjured testimony also violated due process. *Id.* at 31-32. In *Napue* v. *Illinois*, this Court further expanded *Mooney*, holding the prosecutor's knowing failure to correct perjured testimony, relating solely to the credibility of the witness, constituted a violation of due process. 360 U.S. at 269. This Court in *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) found the government's failure to make available exculpatory evidence specifically requested by the defendant also constituted a violation of due process, where the evidence was material either to guilt or punishment.[3] Further, evidence that would tend to impeach a material government witness is *Brady* material. *See Giglio* v. *United States*, 405 U.S. at 154.

The Eighth Circuit's decision is in direct conflict with *Giglio* v. *United States*, 405 U.S. 150 (1972). *Giglio* involved an allegation of perjury by a government witness who testified that no promises had been made to him by the government in exchange for his testimony. After trial, it was discovered that an Assistant U.S. Attorney who was not the prosecutor in the case had promised the witness that he would not be prosecuted if he testified. The Assistant U.S. Attorney who tried the case had no knowledge of this promise. The Court however imputed the knowledge to the government, holding that "whether the nondisclosure was the result of negligence or design, it is the responsibility of the prosecutor." 405 U.S. at 154.

A prosecutor should know of evidence if it is in his possession or in the possession of any agency involved in

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[3] A specific *Brady* request was made by petitioner's trial counsel herein.

the prosecution.[4] In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court made note of the situation where the "prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." Id. at 103. Thus, circumstances which would demonstrate perjury by a prosecution witness, although not specifically known to the prosecutor, are imputed to his knowledge because they are possessed by an investigative arm of the prosecution.

Thus, governmental knowledge of the chief prosecution witness' perjured trial testimony is not based on "speculation and conjecture" as held by the Eighth Circuit. See p. 4a of Appendix hereto. This was a "specific instance of prosecutorial misconduct" by the "use of 'known perjured testimony,' in a deprivation of fundamental due process." See p. 4a of Appendix hereto.[5]

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[4] "The 'prosecution' involves all agencies of the federal government involved in any way in the prosecution of criminal litigation." *United States* v. *McCord*, 509 F.2d 334, 342 n.14 (D.C. Cir. 1974) *cert. denied*, 424 U.S. 930 (1975). For similar holdings, see *United States* v. *Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1352 n.91 (D.C. Cir. 1974); *United States* v. *Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971); *Emmett* v. *Ricketts*, 397 F.Supp. 1025, 1041 (N.D. Ga. 1975). See also, *ABA Standards, Discovery & Procedure Before Trial*, § 2.1(d) (1970).

[5] The government used the testimony of its key witness, Braxton Jones to establish a motive for Mr. Widgery's submission of the allegedly false purchase orders. The government argued strenuously that Widgery submitted the phony purchase orders in order to meet his obligation to produce $135,000 of net profit on line 28 of the Robo Wash tax return. Braxton Jones supported this position through his testimony that the Robo Wash tax return did not show a profit. In fact, in his motion for new trial, petitioner was able to substantiate that Jones had perjured himself on this key "motive" issue through

The obvious conflict between the decision of the Eighth Circuit in this case and the clear line of cases emanating from this Court justifies the grant of certiorari to review the judgment below.

2. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Standard Of Review In Evaluating Motion For New Trial Under Rule 33 Of The Federal Rules Of Criminal Procedure.

The Court should issue a writ of certiorari in this action in order to resolve a direct and specific conflict among the circuits on the application of *Larrison* v. *United States*, 24 F.2d 82 (7th Cir. 1928).[6]

Petitioner argued in his motion for new trial that the government knowingly used perjured testimony at his trial. In the alternative, petitioner argued that, even if the government did not know of the perjury at the time, a new trial is required under *Larrison* if the perjury "might" have affected the outcome. Petitioner submitted

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the production of the tax return for the fiscal year ending September 30, 1977, showing a taxable income on line 28 of $496,604.

Certainly, in the context of this fraud prosecution, where the government was relying upon a single motive to convict the defendant, and attempting to establish this motive through the testimony of one key witness, the government, at the very least, should have known the true facts as documented by the actual tax return and, therefore, the perjury of its chief witness. Otherwise, a situation would exist involving the "corruption of the truth-seeking function of the trial process." *United States* v. *Agurs*, *supra* at 104.

[6] This Court has not enunciated the standard for determining when a new trial is to be granted where perjury has occurred at trial. *United States* v. *Johnson*, 327 U.S. 106, 111 n.5 (1946).

that the correct standard of review of his motion was that stated in *Larrison* which requires a new trial when:

> (a) the Court is reasonably well-satisfied that the testimony given by a material witness is false;
>
> (b) That without it the jury *might* have reached a different conclusion;
>
> (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. [Original emphasis]

Id. at 87-88.

The Eighth Circuit affirmed the District Court's finding that there was no proof of governmental knowledge of the perjury or other misconduct, and therefore, rejected the application of *United States* v. *Runge*, 593 F.2d 66 (8th Cir. 1979), *cert. denied*, 444 U.S. 859 (1979), the standard applicable when there is governmental misconduct. See p. 4a of Appendix hereto.

The Court then rejected the *Larrison* test without discussion, and applied the stricter standard of review contained in the traditional Criminal Rule 33 or "*Berry*" test, which was first stated in *Berry* v. *Georgia*, 10 Ga. 511 (1851). Under Rule 33 a new trial is to be granted only if the following criteria are met:

> 1. The evidence must be in fact newly discovered, that is discovered since the trial;
>
> 2. Facts must be alleged from which the court may infer diligence on the part of the movant;
>
> 3. The evidence relied upon must not be merely cumulative or impeaching;
>
> 4. It must be material to the issues involved; and

> 5. It must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. *Ward*, 544 F.2d 975, 977 (8th Cir. 1976).

There is a significant split among the circuits on the application of the *Larrison* test. *See* 8A *Moore's Federal Practice*, para. 33.06[1]; 2 Wright, *Federal Practice and Procedure*, § 557. The majority of the circuits have adopted the position taken in *Larrison: United States* v. *Wright*, 625 F.2d 1017, 1020 (1st Cir. 1980); *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973); *United States* v. *Wallace*, 528 F.2d 863, 866 (4th Cir. 1976); *United States* v. *Smith*, 433 F.2d 149, 150-151 (5th Cir. 1970); *Gordon* v. *United States*, 178 F.2d 896, 900 (6th Cir. 1949); *United States* v. *Gabriel*, 597 F.2d 95, 98 (7th Cir. 1979), *cert. denied*, 444 U.S. 858 (1979).

In 1975 the Second Circuit Court of Appeals became the first circuit to reject the *Larrison* test in *United States* v. *Stofsky*, 527 F.2d 237 (2d Cir. 1975), *cert. denied* 429 U.S. 819 (1976).

> While the *Berry* "probability" standard discussed above generally governs challenges to a previous trial based upon newly-discovered evidence, a less stringent test has frequently been voiced in response to revelations of perjury. Under that test, which appears to have had its origins in *Larrison* v. *United States* 24 F.2d 82, 87 (7th Cir. 1928) a new trial will be granted if, without the false testimony, the jury "might have reached a different conclusion."
>
> Most Circuits have expressed their allegiance to Larrison. *See generally*, 8A Moore's *Federal Practice* §§ 33.04(1) & 33.06(1). In recent years, however, we have expressed increasing discomfort with the *Larrison* test in cases that do not involve prosecutorial misconduct.

Id. at 245.

The Court felt that evidence that the trial contained perjured testimony was merely one form of newly discovered evidence, and that there was no significant distinction between new evidence of perjured testimony and other new evidence such that a different standard of review should apply.

In 1979 the Ninth Circuit adopted the Second Circuit's position in rejecting the *Larrison* test in *United States* v. *Krasny*, 607 F.2d 840, 842-845 (9th Cir. 1979) *cert. denied* 455 U.S. 942. Judge Ely dissented from that decision.

> Not only do I believe that the "might" or "possibility" standard applied by the *Larrison* line of cases is the more appropriate standard when, as here, the chief prosecution witness recants material portions of her testimony, but I consider the application of such a test required by the teaching of *Mesarosh* v. *United States*, 352 U.S. 1, 77 S. Ct. 1, 1 L.Ed 2d 1 (1956).

Id. at 847.

Both the Tenth Circuit and the District of Columbia Circuit have recognized the conflict among the circuits, but have declined to adopt a standard in cases which they felt would not merit a new trial under either standard. *United States* v. *Jackson*, 579 F.2d 553 (10th Cir. 1978), *cert. denied*, 439 U.S. 981 (1978); *United States* v. *Mackin*, 561 F.2d 958, 961 (D.C. Cir. 1977). The Eighth Circuit cites *Larrison* in *United States* v. *Runge*, 593 F.2d 66 (8th Cir. 1979), *cert. denied*, 444 U.S. 859 (1979), but does not specifically address the issue.

The petitioner urges the Court to issue a writ of certiorari in this case to establish a uniform standard in the federal courts for the review of motions for new trial. The need for a consistent standard is particularly apparent in this case. The majority of the transactions which were the subject of the indictment occurred in the Seventh Circuit,

which recognizes the *Larrison* standard. The petitioner's substantive rights should not be determined by the fact that the government chose to prosecute him in the Eighth Circuit, which apparently does not recognize *Larrison*. This case presents an appropriate vehicle for the Court to exercise its supervisory power over the federal courts and to insure uniformity in review of new trial motions.

The petitioner further urges that the standard adopted be that in *Larrison*, which would permit a new trial, where there has been perjury in the trial, upon a showing that the perjury "might" have affected the verdict. Petitioner submits that fundamental notions of due process and fair play require that criminal convictions not be obtained through false testimony. If due process means anything, it means that the government should not use perjured testimony, even unwittingly, to gain a conviction. *Giglio* v. *United States*, 405 U.S. 150, 154 (1972).

Perjured testimony is not only an injustice to the defendant in a criminal case, it is an affront to the court and jury as well. It subverts the very foundation of the judicial process by corrupting the fact-finding process. As this Court pointed out in *Mesarosh* v. *United States*, 352 U.S. 1 (1956) when it found that perjured testimony had

> poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurities. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

Id. at 14.

The government has the ability to eliminate perjured testimony from its case and has an obligation to the court and the defendant to do so. The prophylactic effect of the *Larrison* rule will be to promote closer scrutiny by the government of questionable witnesses. This is in accord with the widely held view that the prosecutorial function is not to obtain a conviction, but to promote the ends of justice.

At issue here is the integrity of the federal prosecutorial system. In the final analysis, this Court will determine whether or not the integrity of the federal prosecutorial system is of sufficient importance to devote judicial time and energy necessary to retry cases involving perjured testimony.

3. The Decision Below In Denying A Request For An Evidentiary Hearing In Connection With Motion For New Trial So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

In the proceedings below, petitioner argued that the peculiar circumstances of his case entitled him, at a minimum, to an evidentiary hearing. In his motion for new trial, petitioner established that the government's chief witness, Braxton Jones, committed perjury, that Jones defrauded Goppert Bank on similar transactions unrelated to petitioner, and that the government was told of this fraud. The government never denied that Braxton Jones committed perjury, or that he was involved in an independent fraud of Goppert Bank of which petitioner was unaware at the time of trial. Further, the government never denied the F.B.I. agent investigating the case was told of Jones' fraud by official(s) from the Goppert Bank.

Based on this evidence, petitioner requested a new trial on grounds of governmental misconduct and material perjured testimony; or, in the alternative, an evidentiary hearing in which to explore the government's conduct (and knowledge) in relation to the newly discovered evidence, and its failure to disclose that evidence to the defense. The District Court and thereafter the Eighth Circuit denied the motion for new trial on the grounds that petitioner failed to establish the government had knowledge of the perjured testimony, and further denied petitioner's request for an evidentiary hearing. See pp. 3a, 4a of Appendix hereto. Petitioner submits that based on this record, he was entitled to an evidentiary hearing in order to explore these issues. *DeMarco* v. *United States*, 415 U.S. 449 (1974).

The need for a hearing here was further compelled by the fact that the trial judge who had presided over the first three days of testimony withdrew from the trial and was replaced on the fourth day by the second trial judge, who ultimately completed the trial of the case in two additional days of testimony. The second judge, who ruled on the post-trial motions filed by petitioner, did not hear the majority of the government's testimony, including the testimony of its key witness, Braxton Jones. Thus, the ability of the presiding judge to observe the demeanor and weigh the credibility of the witness at trial was lost in this case in connection with the testimony of Jones, which formed the basis of petitioner's post-trial claims regarding perjured testimony. *Cf. United States* v. *Ward*, 544 F.2d 975, 976 (8th Cir. 1976). Certainly, an evidentiary hearing on the new trial motion would have permitted the trial judge the opportunity he lost by not hearing or viewing the evidence.

It is well settled that the standard of review applicable to a motion for new trial varies depending on the nature of the new evidence and the government's conduct in relation to it. *See United States* v. *Agurs*, 427 U.S. 97 (1976). It is, therefore, essential that a trial court reviewing a motion for new trial alleging governmental misconduct and perjured testimony have all of the evidence before it regarding the government's conduct and allow a defendant (and the court) the opportunity to adequately explore the government's alleged misconduct. Otherwise, the government is able to effectively "stonewall" the case, since it is the sole source of information relative to its own conduct.

It is clear that a hearing would have been required if petitioner's motion were brought pursuant to 28 U.S.C. § 2255:[7] "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

Where the issues raised in a new trial motion are constitutional ones, as are the petitioner's here, the purpose of a 2255 motion and a new trial motion under Rule 33 are substantially the same. *Cf. Bruno* v. *United States*, 180 F.2d 393, 394 (D.C. Cir. 1950). The chief distinction is that the defendant must be incarcerated to raise the former. This distinction has no impact on whether or not

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[7] "If an issue of fact is presented the practice appears to have been to issue the writ [of habeas corpus], have the petitioner produced, and hold a hearing at which evidence is received. This is, we think, the only admissible procedure." *Walker* v. *Johnston*, 312 U.S. 275, 285 (1941).

evidentiary hearing on the motion is appropriate. There is no logic in requiring a defendant to become incarcerated in order to be entitled to an evidentiary hearing on his motion.

In light of all of these circumstances, petitioner was entitled to an evidentiary hearing herein.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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August 4, 1982

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1172

WILLIAM ARTHUR WIDGERY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From The United States District Court For The Western District Of Missouri

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Submitted: November 12, 1981
Filed: March 31, 1982

Before ROSS and STEPHENSON, Circuit Judges, and HOWARD, District Judge.*

HOWARD, District Judge

This is an appeal by the appellant, William Arthur Widgery, from the district court's[1] denial of his motion and supplemental motions for a new trial on grounds of newly discovered evidence. The thrust of appellant's argument for reversal is that the district court applied the wrong standard of review in considering his motion and supplemental motions for a new trial and abused its discretion in not affording him an evidentiary hearing on his motions. We affirm.

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*George Howard, Jr., District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

The pertinent facts for a proper resolution of the issues tendered are: Appellant was charged on October 4, 1979, in a twenty-eight count indictment with mail and wire fraud in violation of Title 18 U.S.C. §§ 1341 and 1343 (1976), in connection with the submission of orders for car washing equipment to Robo Wash, Inc.[2] The jury returned a verdict of guilty on Counts I through X and not guilty on Counts XI through XXVIII. Appellant was sentenced to pay a $500.00 fine on each count and to be imprisoned for a term of five years on each count, the sentences to run concurrently. The appellant appealed his conviction to this Court. On December 5, 1980, this Court reversed his conviction on Counts V and X and affirmed the remaining counts. *United States* v. *Widgery*, 636 F.2d 200 (8th Cir. 1980).

On December 29, 1980, appellant filed a motion for a new trial on grounds of newly discovered evidence which was denied by the trial court on February 11, 1981. Appellant filed an appeal to this Court. On March 9, 1981, appellant filed a motion for remand to the trial court in order to supplement the record with additional newly discovered evidence. On March 30, 1981, this Court remanded the case to the district court, stating:

> "the district court shall supplement the record by inclusion of the alleged new evidence . . . and may in its discretion grant an evidentiary hearing if it appears necessary to do so."

The purported relevance of the alleged newly discovered evidence, identified later, may be understood clearly by the following summary: Braxton Jones, president of Robo Wash, and who testified on behalf of the government that the orders

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[2] On February 4, 1977, appellant entered into an agreement with Robo Wash to produce a sufficient number of orders for equipment in order to generate a profit for Robo Wash so that its tax return for the fiscal year ending September 30, 1977, would show a before-tax profit on line 28 of $135,000. The figure of $135,000 was designated because Robo Wash had a loss carry forward of $135,000 that it would lose if it were not taken in the taxable year ending September, 1977.

were fraudulent, took the orders from appellant and used them as security for loans from Goppert Bank which had financed Robo Wash over a number of years. Appellant claimed that the orders were legitimate although contingent on financing and that Jones committed the fraud when he used the orders as security without explaining the contingencies.

Since the trial, appellant allegedly discovered new evidence which establishes that Braxton Jones defrauded Goppert Bank on a number of loan transactions unrelated to appellant. Appellant further contends that Jones committed perjury in order to implicate and place the blame on him. Further, appellant claims that newly discovered evidence reveals that the government had knowledge of the wrongdoing of Jones and failed to disclose this to appellant before trial.

The district court allowed the record to be supplemented and after reviewing the record, the trial court determined that an evidentiary hearing was unwarranted and again denied the motion for a new trial. The present appeal ensued.

I.

Appellant urged the district court, as he now does on appeal, to apply the standards enunciated in *United States* v. *Runge*, 593 F.2d 66 (8th Cir. 1979) rather than the traditional and stricter test in *United States* v. *Ward*, 544 F.2d 975 (8th Cir. 1976), in evaluating his motions for new trial. To obtain a new trial under *Ward*, a movant must meet the following five requirements: (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cummulative or impeaching; (4) it must be material to the issues involved; and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Under *Runge*, "knowing use of perjured testimony requires that a conviction be set aside 'if there is any reasonable likeli-

hood that the false testimony could have affected the judgment of the jury.' " *United States* v. *Runge*, supra, at 73, quoting from *United States* v. *Agurs*, 427 U.S. 97 at 103.

To demonstrate perjury by Jones, appellant submitted several documents including affidavits from Nelse Carlson concerning the Goppert Bank transaction, from James Harold regarding the procedure for obtaining financing, and from Harry Duggan "clarifying" his trial testimony. He also sought to demonstrate the government's knowledge and use of perjured testimony by documents filed in a civil action that were submitted by Goppert Bank to its insurance company on certain losses sustained by the bank in its financial dealings with Robo Wash. Since these documents indicate that the bank reported the circumstances of the fraudulent transaction to the F.B.I. office in Kansas City on March 30, 1978, appellant argues the government, including the attorneys prosecuting the case, knew or should have known that Jones would have given perjured testimony at trial to conceal his own criminal activities.

To invoke the *Runge* test, there must be "specific instances of prosecutorial misconduct, such as the use of 'known perjured testimony,' in a deprivation of fundamental due process." *United States* v. *Carlone*, 603 F.2d 63 (8th Cir. 1979). The district court found, and we agree, that the evidence relating to the government's knowledge of the alleged perjury is based on speculation and conjecture. Therefore, the district court did not err in rejecting the *Runge* test and instead using the *Ward* test in evaluating the motions for new trial.

Appellant further contends that he is entitled to a new trial even if the *Ward* standards are applied. To demonstrate that the newly discovered evidence was in fact discovered after trial, he points out that through an investigation following the trial, the work papers of the accountants who performed an audit of Robo Wash in 1977 were discovered. He contends he meets the requirement of due diligence since the case was extremely complex; there were geographic problems with

appellant, his attorney and the witnesses dispersed in Kansas City, Missouri, Florida and Indiana; there was no way to learn of the other fraudulent transactions unrelated to appellant; trial counsel had tried to obtain a relevant 1977 tax return previously; and Jones changed his testimony at trial from what was expected so appellant had no way of knowing there would be a need for evidence to impeach Jones. While acknowledging that the newly discovered evidence is impeaching, appellant asserts that it is not "merely impeaching", but is substantive evidence since it establishes that someone other than appellant committed the crimes. Appellant argues that the Jurgens Vrooman, Inc.'s evidence—a loan from Goppert Bank which was allegedly secured by an incomplete sale of equipment to Jurgens Vrooman, Inc.—is material since it directly relates to Jones' knowledge and involvement; the tax return is material since it rebuts appellant's alleged motive; and that certain affidavits are material in establishing over twenty incidents where Jones committed perjury. He states he meets the final *Ward* requirement since this evidence would probably produce an acquittal since Jones' testimony would be completely discredited and his testimony was the basis for the convictions.

An appellate court does not sit as a *de novo* fact-finder. "Our review of a grant or denial of a motion for a new trial based on newly discovered evidence is limited, and the trial court's decision will not be reversed absent a clear abuse of discretion." *United States* v. *Adkins*, 545 F.2d 1153 at 1154 (8th Cir. 1976). The district court found appellant's newly discovered evidence to be merely impeaching and with due diligence could have been discovered prior to trial. The district court further found that there was little likelihood that the jury's verdict would be affected by the new evidence.

The primary obstacle to appellant's request for a new trial is his failure to meet the requirement that the evidence not be cummulative or merely impeaching. All the evidence submitted is a series of attacks on Jones' testimony. Stripped of argument, the fact remains that the evidence is merely impeaching and is a continuation of the strategy employed at

trial. Appellant also has problems with other *Ward* requirements. The evidence and arguments presented tend to show that the material now relied upon could have been discovered prior to trial with due diligence. Finally, we are not persuaded that the evidence, on a retrial, would probably produce an acquittal.

II.

A brief note should be mentioned regarding appellant's argument that the district court erred in not holding an evidentiary hearing. On remand we directed the district court to allow the record to be supplemented and, in its discretion, to hold a hearing if deemed necessary. Appellant was given the opportunity to submit evidence and argument in support of his motions. The record reveals that he responded by filing at least six affidavits and other documents. Based on the record before us, we can find no abuse of discretion.

Affirmed.

A true copy.

Attest: CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 81-1172

UNITED STATES OF AMERICA, *Appellee*,

v.

WILLIAM ARTHUR WIDGERY, *Appellant*.

Appeal From The United States District Court For The Western District Of Missouri

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Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 6, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 79-00134-01-CR-W-1-5

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WILLIAM ARTHUR WIDGERY, *Defendant*.

Filed February 11, 1981

MEMORANDUM AND ORDER

In a twenty-eight count indictment returned by the grand jury on October 4, 1979, William Arthur Widgery was charged with mail fraud and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 (1976). Following a jury trial, Widgery was found guilty of five counts of mail fraud and five counts of wire fraud. A timely appeal was filed, and the United States Court of Appeals for the Eighth Circuit recently affirmed Widgery's convictions on eight of the ten counts, setting aside one count each of mail fraud and wire fraud for lack of sufficient evidence. *United States* v. *Widgery*, No 80-1385 (8th Cir., Dec. 5, 1980). This case is now before the Court on defendant's motion for new trial based on the ground of newly discovered evidence.

Defendant's motion for new trial is premised on several items of alleged newly discovered evidence which purportedly show that Braxton Jones, a prosecution witness at Widgery's trial, deliberately perjured himself in order to conceal his own fraudulent and unlawful conduct. Jones was president of Robo Wash, Inc., a company that manfactured automatic car wash equipment. On behalf of Robo Wash, he entered into an agreement with Widgery on February 4, 1977, that required Robo Wash to transfer 625,000 shares of lettered common stock to Widgery. In return, Widgery agreed to supply Robo Wash

with certain operational and administrative assistance. Among other things, Widgery promised to generate $135,000 in "before tax" net income for Robo Wash prior to October 1, 1977. In order to produce this income Widgery solicited purchasers of Robo Wash car wash equipment. Using purchase orders channeled to Robo Wash by Widgery as security, Jones obtained loans totaling several thousand dollars from Goppert Bank. Robo Wash was ultimately unable to repay these loans. Widgery contends that the loans were procured under fraudulent circumstances and that Jones' testimony at trial was geared toward concealing his own fraud and shifting the blame for any wrongdoing to Widgery. In support of this contention, defendant advances the following items of alleged newly discovered evidence:

(1) The gist of Larry Duggan's testimony at trial was that a purchase order submitted to Robo Wash on behalf of Suncoast Dock & Davit Corporation was false and bore Duggan's forged signature. In a sworn affidavit given to defendant, Duggan now states that the purchase order was actually legitimate but contingent upon consummation of certain financing arrangements. Defendant insists that Braxton Jones was fully aware of the tentative nature of the purchase order at the time he received it, but nevertheless used the purchase order to obtain a $40,000 loan from Goppert Bank. Duggan's affidavit indicates that he was not entirely forthright at trial because he feared personal liability for the Suncoast purchase order.

(2) Braxton Jones testified at trial that Widgery failed to produce the "before tax" net income called for in their agreement. Defendant contends that this testimony was false and offers Robo Wash's corporate tax return for 1977, and sworn statements by two accounts who audited Robo Wash as proof that Jones committed perjury.

(3) Defendant avers that Braxton Jones secured a $40,000 loan from Goppert Bank with a purchase order submitted by Jurgens Vrooman, Inc. of Beatrice, Nebraska. Defendant submits the sworn affidavit of Lowell Squire, a Robo Wash dis-

tributor whose territory encompassed Beatrice, Nebraska, as proof that this purchase order was false. Since this purchase order was not solicited by Widgery, defendant argues that this is evidence that Jones engaged in fraudulent conduct independent of his dealings with Widgery and was motivated to perjure himself in order to implicate Widgery as the fraudulent party.

(4) At trial Braxton Jones testified that Widgery mailed him a purchase order for car wash equipment to be installed at a site in Indianapolis, Indiana. This purchase order was signed by Haskell Stone, but Jones stated that he never had any personal discussion with Stone regarding the construction of the Indianapolis facility. Defendant now tenders Haskell Stone's affidavit wherein he states that he discussed this purchase order with Jones. Moreover, Stone alleges that Jones was aware that his purchase order was contingent upon approval of a SBA loan for which Stone had applied. Defendant submits that this establishes that Jones knew of the contingent nature of the purchase order at the time he used it to obtain financing from Goppert Bank.

(5) Braxton Jones apparently obtained financing from Goppert Bank based on a purchase order submitted on behalf of C & C Sales in Siloam Springs, Arkansas. Defendant contends that this purchase order, as well as an invoice and sight draft submitted to Goppert Bank, was manufactured by Jones and was falsely inflated. An affidavit signed by Nelse Carlson states that this equipment was paid for at the time it was received and that he did not sign a purchase order for it.

(6) Defendant claims that Jones fraudulently obtained financing from Goppert Bank using a false purchase order and sight draft purportedly submitted by James J. Harold, Inc. of Punta Gorda, Florida. Harold's affidavit indicates that he paid for the equipment by check and did not authorize a sight draft drawn on the First National Bank of Punta Gorda.

Defendant argues that the foregoing evidence establishes that Braxton Jones consistently engaged in activities designed

to defraud Goppert Bank out of thousands of dollars. According to defendant's theory, Jones perceived Widgery as a convenient scapegoat and repeatedly perjured himself during Widgery's trial in order to divert the blame for any fraud to the defendant. Defendant requests an evidentiary hearing at which he can present both the above-recited evidence and other, additional evidence to support his motion for new trial. The Court, however, finds that an evidentiary hearing is unnecessary and that, under the circumstances presented here, defendant is not entitled to a new trial.

The standards for the granting of a motion for new trial on the ground of newly discovery evidence have been enumerated many times by our court of appeals. In order to obtain a new trial, the movant must satisfy five requirements:

> (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved, and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. *Ward*, 544 F.2d 975, 977 (8th Cir. 1976). *Accord*, *United States* v. *Cardarella*, 588 F.2d 1204, 1205 (8th Cir. 1978); *United States* v. *Frye*, 548 F.2d 765, 769 (8th Cir. 1977); *United States* v. *McColgin*, 535 F.2d 471, 476 (8th Cir. 1976); *United States* v. *Pope*, 415 F.2d 685, 691 (8th Cir.), *cert. denied*, 397 U.S. 950, 90 S.Ct. 973 (1969); *Batsell* v. *United States*, 403 F.2d 395, 403 (8th Cir. 1968), *cert. denied*, 393 U.S. 1094, 89 S.Ct. 865 (1969).

Although *Ward* states the traditional test for determining whether a new trial should be ordered on the ground of newly discovered evidence, the Eighth Circuit recently has indicated that a different standard should be applied in certain circum-

stances. In *United States* v. *Runge*, 593 F.2d 66 (8th Cir. 1979), the court stated

> [u]nlike the stricter standard of materiality used in new trial motions based on discovery of new evidence or failure of the prosecution to disclose favorable evidence, knowing use of perjured testimony requires that a conviction be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

Id. at 73, quoting from *United States* v. *Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976). The *Runge* standard, however, is applicable only to those cases involving "specific instances of prosecutorial misconduct, such as the use of 'known perjured testimony,' or other governmental corruption of the truth finding process resulting in a deprivation of fundamental due process." *United States* v. *Carlone*, 603 F.2d 63, 67 (8th Cir. 1979). *See also United States* v. *Burkhead*, 491 F. Supp. 1166, 1171-174 (W.D. Mo. 1980) (thorough discussion of the distinction between the *Ward* and *Runge* tests).

While defendant does not cite *Runge*, he does recognize that a lesser standard is applied when a conviction is obtained through the use of known perjured testimony. *See* defendant's suggestions in support of motion for new trial at 12. But the record in this case, as well as defendant's present motion, is utterly devoid of any evidence that counsel for the government actually knew or should have known that Braxton Jones' testimony might be perjured. Defendant simply asserts that Jones' "fraud was so pervasive that it is clear that the United States knew that there were irregularities with Robo Wash's loan transaction unrelated to Mr. Widgery." Defendant's supplemental motion for new trial at 7. Whether the prosecution was aware of any actual or alleged irregularities in Jones' financial dealings with Goppert Bank is far from established. At best, it might be argued that the government was negligent in failing to investigate more thoroughly Jones' financial transactions with Goppert Bank. However, this Court refuses to "employ the omniscience of a Monday morning quarterback as the standard for determining what investigation should

have been made by the government." *United States* v. *Stofsky*, 527 F.2d 237, 244 (2d Cir. 1975), *cert. denied*, 429 U.S. 819, 97 S. Ct. 65-66 (1976). And, in the absence of any substantial evidence that the prosecutor knew or should have known that Braxton Jones' testimony was perhaps perjured, the Court declines to apply the less restrictive standard enunciated in *Runge*. Thus, the Court concludes that the criteria set forth in *Ward* provide the appropriate standards for determining defendant's entitlement to a new trial based on newly discovered evidence.

Addressing first defendant's request for an evidentiary hearing on his motion for new trial, the Court notes that, generally speaking, a trial court has the discretion, after consideration of the briefs and affidavits submitted in support of the new trial motion, to deny a request for such a hearing. *United States* v. *Pitts*, 508 F.2d 1237, 1241 (8th Cir. 1974), *cert. denied*, 421 U.S. 961, 95 S. Ct. 1958 (1975). Although in some cases there may be exceptional circumstances which require that an oral hearing be granted, "[a] motion for new trial based on newly discovered evidence may be decided ordinarily upon affidavits without a hearing." *United States* v. *Ward*, 544 F.2d 975, 976 (8th Cir. 1976). After consideration of all the circumstances of this case, the Court finds that little useful purpose would be served in holding a formal evidentiary hearing and defendant's request for a hearing will, therefore, be denied.

Turning now to the facts of this case, and the circumstances surrounding the alleged discovery of new evidence, the Court is not persuaded that defendant is entitled to a new trial under the traditional standards stated in *Ward*. The heart of defendant's present motion is his belief that given the opportunity to present his newly discovered evidence, Braxton Jones' testimony would be sufficiently impeached so as to bolster the defense theory that Jones, not Widgery, was the real perpetrator of a fraud. Therein lies the problem, however. The newly discovered evidence proffered by Widgery is merely impeaching and does not constitute substantial evidence in defendant's favor. Under the principles recognized in *Ward*, evidence

which is simply cumulative and impeaching is not sufficient to warrant the granting of a new trial. Hence, even though the evidence offered by defendant may be more favorable to his theory of the case, it does not satisfy the requirements for the granting of a new trial.

Beyond the foregoing, the Court also finds that the defendant has not demonstrated that the evidence he now tenders in support of his new trial motion could not have been discovered previously through the exercise of due diligence. "[I]t is well-settled that the burden is upon the movant in a new trial motion to establish that he could not, with due diligence, have discovered the evidence before, or at the latest, at trial." *United States* v. *Schwartzbaum*, 527 F.2d 249, 254 (2d Cir. 1975), *cert. denied*, 424 U.S. 94, 96 S. Ct. 1410 (1976). Widgery has failed to meet this burden. While it might be argued that the evidence in question is newly discovered with regard to defense counsel, this does not mean that it was newly discovered as to the defendant personally. *United States* v. *Carlone*, 603 F.2d 63, 67 (8th Cir. 1979). A defendant cannot be said to have exercised due diligence if he fails to investigate leads known to him before trial. *United States* v. *Bullock*, 579 F.2d 1116, 1118 (8th Cir.), *cert. denied*, 439 U.S. 967, 99 S. Ct. 456 (1978). *United States* v. *Schartzbaum*, *supra*, 527 F.2d at 254; *Mills* v. *United States*, 281 F.2d 763, 739 (4th Cir. 1960).

There has been no adequate justification advanced as to why the leads investigated after Widgery's trial and conviction could not have been pursued prior to trial. For example, Widgery obviously knew of the audit report prepared by the accountants Barnaby and Bixby and with due diligence could have presented their testimony and evidence at trial. Similarly, defendant could have easily subpoenaed Robo Wash's corporate tax return for the fiscal year ending October 1, 1977 and refuted Jones' testimony regarding the amount of the company's before tax income. The evidence concerning Jones' allegedly fraudulent manipulation of fabricated purchase orders and sight drafts to obtain financing from Goppert Bank also could have been presented at trial. Briefly, the Court notes that Larry Duggan's recantation of his trial testimony is

highly suspect and entitled to little weight. *United States* v. *Coleman*, 460 F.2d 1038, 1040 (8th Cir.), *cert. denied*, 409 U.S. 871, 93 S. Ct. 200 (1972).

Finally, in determining whether newly discovered evidence is of such a nature that it would probably produce an acquittal, the Court must consider the evidence in light of the entire record made at trial. Examination of the record in this case reveals that although Braxton Jones was an important prosecution witness, his was not the only testimony upon which the jury could rely in determining Widgery's guilt or innocence. Other, persuasive evidence of Widgery's participation in a scheme or artifice to defraud was presented by the government. Moreover, Jones was vigorously cross-examined by defense counsel at trial and his veracity and credibility were seriously challenged. The evidence the defendant now would have the Court consider as newly discovered essentially constitutes a redoubled attack on the credibility of Jones' testimony. Consequently, viewing all the evidence, the Court finds that there is little likelihood that the jury's verdict would have been affected by disclosure of the evidence raised in defendant's new trial motion. Accordingly, it is hereby

ORDERED that defendant's motion for new trial on the ground of newly discoverd evidence be, and is hereby, denied. It is further

ORDERED that the Court's order of January 20, 1981, staying the execution of sentence upon defendant William Arthur Widgery be, and the same is hereby, vacated.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

Kansas City, Mo.
February 11, 1981.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 79-00134-01-CR-W-5

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM ARTHUR WIDGERY,

Defendant.

Filed: June 26, 1981

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion to supplement the record of his previous motion for new trial. On December 29, 1980, following the Eighth Circuit's affirmance of defendant Widgery's conviction on eight counts of wire and mail fraud, *United States* v. *Widgery*, 636 F.2d 200 (8th Cir. 1980), defendant filed a motion for new trial based on the ground of newly discovered evidence. Fed. R. Crim. P. 33. Simply put, the crux of Widgery's motion was that Braxton Jones, president of Robo Wash, Inc. and a key prosecution witness at Widgery's trial, deliberately committed perjury in an effort to shift to Widgery the entire blame for several fraudulent loan transactions involving Goppert Bank. Widgery contended that Jones gave perjured testimony at his trial because Jones himself had defrauded Goppert Bank by obtaining several large loans with fictitious purchase orders presumably submitted to Robo Wash by various business entities. On February 11, 1981, this Court denied defendant's motion for new trial, holding that Widgery had failed to satisfy the requirements established in this circuit for the granting of a new trial on the basis of newly discovered evidence. In so holding, the Court specifically found that the stricter standard of materiality enunciated in *United States* v. *Ward*, 544 F.2d 975, 977 (8th Cir. 1976), was applicable in the context of this

case rather than the less stringent standard applied in cases where the government has knowingly used perjured testimony. *See United States* v. *Runge*, 593 F.2d 66, 73 (8th Cir. 1979).

Upon receipt of the court's order denying defendant's motion for new trial, defendant promptly appealed this determination to the United States Court of Appeals for the Eighth Circuit. While that appeal was pending, defendant filed a motion with the appellate court requesting that this case be remanded so that he might supplement his motion for new trial with additional, newly discovered evidence not previously presented to this Court. The court of appeals thereupon entered an order remanding the case to this court, stating that the "district court shall supplement the record by inclusion of the alleged new evidence . . . and may in its discretion grant an evidentiary hearing if it appears necessary to do so." Defendant has now had full opportunity to supplement the record pertaining to his new trial motion and the Court has carefully considered both defendant's alleged newly discovered evidence and the government's response thereto. Following this review, the Court has concluded that an evidentiary hearing is unwarranted and, further, for the reasons stated herein, that defendant has failed to satisfy the applicable criteria for the granting of a new trial on the ground of newly discovered evidence.

Defendant's supplemental motion again raises the issue of whether Braxton Jones committed perjury at Widgery's trial in order to conceal his own fraudulent dealings with Goppert Bank. In his initial motion for new trial based on newly discovered evidence, Widgery alleged that Jones procured a $40,000 loan from Goppert Bank using a false purchase order purportedly placed by Jurgens Vrooman, Inc. of Beatrice, Nebraska. This purchase order had not been generated by the defendant and Widgery claimed that it had been fabricated by Jones as part of his own scheme to defraud Goppert Bank. Further, the defendant argued that this evidence, as well as other, alleged newly discovered evidence proffered by the

defendant, showed that Braxton Jones was motivated to perjure himself in order to avoid any criminal responsibility on his own part. As indicated, however, applying the standards set forth in *United States* v. *Ward*, *supra*, and other similar cases, this Court declined to grant defendant a new trial. Defendant now offers additional evidence relating to the Jurgens Vrooman transaction which he contends establishes that he is entitled to a new trial under either the *Ward* test or the less burdensome *Runge* standard.

Defendant's latest newly discovered evidence arises out of the pleadings filed in a civil action between Goppert Bank and the Fidelity and Casualty Company of New York. Fidelity issued a comprehensive business insurance policy to Goppert Bank in November, 1976. Goppert Bank has sued Fidelity on this policy, claiming that the insurer is liable to the bank for certain losses sustained by the bank in its financial dealings with Robo Wash. In connection with discovery conducted in that case, Goppert Bank informed Fidelity that it first learned that the Jurgens Vrooman purchase order was fabricated in February, 1978. Goppert Bank further indicated, in a "proof of loss" form submitted to the insurance company, that the circumstances of this fraudulent transaction were reported to the Kansas City office of the Federal Bureau of Investigation on March 30, 1978. Defendant contends that the evidence he has uncovered in this civil suit establishes that the government had knowledge that Robo Wash, *i.e.*, Braxton Jones, used a false purchase order to acquire a $40,000 loan, but failed to disclose this information to the defendant. Because this presumably favorable evidence was never disclosed to the defendant, Widgery argues that there are some serious questions concerning the propriety of the government's conduct in prosecuting him. Further, defendant submits that the government's attorneys knew or should have known that Jones was likely to give perjured testimony at his trial in order to conceal his own criminal activities.

Although defendant continues to urge this Court to grant him a new trial on the theory that his initial trial was irreparab-

ly tainted by perjury, the Court remains unconvinced that defendant has carried the burden necessary to entitle him to such relief. The Court still firmly believes that the alleged newly discovered evidence tendered by defendant must be evaluated in light of the standard articulated in *Ward*. As this Court noted in its prior order denying defendant a new trial, the *Runge* standard is applicable only to those cases where the defendant has produced evidence of specific instances of prosecutorial misconduct. In this case defendant's newly discovered evidence falls far short of establishing specific instances of prosecutorial misbehavior or that there has been an intentional governmental " 'corruption of the truth-seeking function of the trial process.' " *United States* v. *Runge*, *supra*, 593 F.2d at 73, quoting *United States* v. *Agurs*, 427 U.S. 97, 104, 96 S. Ct. 2392, 2397 (1976). Essentially, defendant's evidence relating to the prosecution's knowledge of Jones' alleged perjury is based on speculation and conjecture. Defendant surmises that because Goppert Bank reported the incident of the false Jurgens Vrooman purchase order to the FBI, the prosecuting attorneys must have been aware of Jones' alleged misdeeds and knew or should have known that Jones was susceptible to perjury. Such a tenuous claim of prosecutorial misconduct, however, is insufficient reason for granting defendant a new trial based on *Runge*. Support for this conclusion is found in the Eighth Circuit's decision in *United States* v. *Carlone*, 603 F.2d 63 (8th Cir. 1979).

In *Carlone* the defendant sought a new trial primarily on the ground that the government had improperly failed to disclose that William Sorg, a brother-in-law of defendant's brother, was a paid government informant. Following Carlone's trial and conviction, Sorg provided Carlone with an affidavit wherein he claimed that he had been paid by FBI to assist that agency in setting up Carlone for arrest and prosecution on a spurious criminal charge. Carlone argued that if this information had been revealed to him before or during this trial he would have refused to enter into a stipulation with the government regarding the lawfulness of certain actions by the government. More-

over, Carlone contended that he would have called Sorg as a witness and used his testimony to attack the credibility of the government's primary witnesses, the two FBI agents who arrested him. Relying upon the standard set out in *Ward*, the district court denied defendant's motion for new trial. On appeal Carlone agrued that the lower court erroneously utilized the *Ward* test and that the *Runge* standard should have been applied under the circumstances of his case. The court of appeals, however, disagreed:

> Assuming arguendo that the newly discovered evidence *might* affect the credibility of the agents' testimony, and consequently might have made Carlone's defense of harassment more believable, leading him not to make the stipulation, such newly discovered evidence does not create a factual situation that falls within the *Runge* standard. The line of cases from which the *Runge* standard, adopted by this court, arose includes *United States* v. *Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976); *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); and *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959). These cases all involve specific instances of prosecutorial misconduct, such as the use of "known perjured testimony," or other governmental corruption of the truth finding process resulting in a deprivation of fundamental due process. The newly discovered evidence in this case does not establish any specific claim that the F.B.I. agents who testified at Carlone's trial perjured themselves, nor does it establish any specific claim of governmental corruption concerning Carlone's trial and the incidents involved therein.

United States v. *Carlone*, *supra*, 603 F.2d at 67 (emphasis original).

In the present case Widgery likewise has failed to produce any evidence which would support a specific claim that the government knowingly presented perjury testimony or permitted false testimony to go uncorrected. Considered in its most favorable light, Widgery has presented evidence from which it might be inferred that Braxton Jones had a motive to commit perjury. There has been no showing that Jones did in

fact give perjured testimony regarding Widgery's participation in the transactions for which he was prosecuted. Widgery's newly discovered evidence simply indicates that the government may have been negligent in failing to discover and disclose evidence which might have been favorable to the defendant's case. This clearly does not amount to a governmental corruption of the truth seeking process as contemplated by *Runge* and *Agurs*. Thus, the Court concludes that the defendant has failed to produce specific or concrete evidence of prosecutorial misconduct which would justify an application of the *Runge* standard to the facts of this case.

Finally, the Court briefly examines defendant's supplemental new evidence under the traditional test enunciated in *Ward*. As with defendant's previous newly discovered evidence, this evidence basically is cumulative and impeaching and it is not of such a nature that, if presented in a new trial, it would "probably produce an acquittal." *United States* v. *Ward*, *supra*, 544 F.2d at 977. Defense counsel made Jones' credibility a major issue in Widgery's trial. He was vigorously cross-examined and the jury was left with little doubt that the defendant seriously disputed the truthfulness of Jones' testimony. The evidence now offered by Widgery merely intensifies the attack on Jones' credibility and, with respect to the crimes for which Widgery was convicted, it does not comprise substantial, independent evidence of his innocence. Hence, the Court finds that defendant's supplemental new evidence is not sufficient to satisfy the requirements established by *Ward* for the granting of a new trial. Accordingly, upon consideration of defendant's supplemental evidence in support of his motion for new trial, it is hereby

ORDERED that defendant's motion for new trial be, and is hereby, denied for the reasons stated above.

/s/ Scott O. Wright
SCOTT O. WRIGHT
UNITED STATES DISTRICT JUDGE

June 26, 1981

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1385

UNITED STATES OF AMERICA,

Appellee.

v.

WILLIAM ARTHUR WIDGERY,

Appellant,

Appeal From The United States District Court For The Western District Of Arkansas

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Submitted: October 17, 1980
Filed: December 5, 1980

Before LAY, Chief Judge; BRIGHT and MCMILLIAN, Circuit Judges.

BRIGHT, Circuit Judge.

Widgery was charged in a twenty-eight count indictment with mail fraud and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343 (1976). A jury found Widgery guilty of counts I through X of the indictment. The district court sentenced him to five years on each of the ten counts, the sentences to run concurrently, and fined him $500 on each count. On appeal Widgery contends that 1) the Government's evidence failed to establish a scheme to defraud and the requisite use of the mails and wire communications in furtherance of the alleged scheme and 2) the district court erred in refusing to grant a mistrial on grounds of jury bias and the extensive time taken for jury deliberations. We set aside his conviction on counts V and X and affirm on the remaining counts.

I. The Charges.

William Arthur Widgery, a self-proclaimed business consultant who could "turn failing businesses around," entered into an agreement with Robo Wash, Inc., a Missouri manufacturer of automatic car wash equipment on February 4, 1977. The agreement called for Robo to transfer 625,000 shares of "lettered" common stock to Widgery if he provided operational and administrative assistance, engaged in promotional and sales activities, and produced $135,000 in before-tax net income prior to October 1, 1977. The resultant mail and wire fraud counts upon which the Government obtained a conviction related to alleged fraudulent orders for car wash equipment placed with Robo by Widgery.

In August 1977, Widgery and his associated, Harvey Jefferson, induced Haskell Stone, a building inspector for the city of Indianapolis, to sign a purchase order for car wash equipment, knowing that Stone owned no assets justifying an extension of credit for such a purchase. To fund this purchase order, Widgery, on behalf of Stone, applied for a Small Business Administration (SBA) loan. The Government charged that Widgery, knowing that Stone possessed no assets, filled out this loan application to falsely show that Stone owned real estate and other assets.[1] Widgery thereafter influenced George Hunter, Assistant Director of the SBA in Indianapolis, to issue an "Authorization and Loan Agreement" indicating approval of a $112,000 interim loan.[2] Widgery's mailing of the Stone purchase order to Robo forms the basis for count I of the indictment.

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[1] Although Widgery told Stone he would transfer stock and land to him to pump up his financial statement, this transfer was never completed.

[2] Widgery took the SBA loan authorization to the Springs Valley National Bank in French Lick, Indiana. Based upon this authorization, that bank made a loan to Widgery and Stone in the amount of $112,000. This money was deposited in Widgery's account in the

On the strength of Stone's $85,000 purchase order, Robo borrowed $60,000 from the Goppert Bank & Trust Company of Kansas City, Missouri. Thereafter, Widgery called the president of Robo and made the allegedly false representation that Jefferson needed an advance commission on the Stone sale to purchase an option on a car wash site. Counts II and III charged that Widgery's telephone call and Robo's subsequent wiring of an $8,550 advance constitute wire fraud.

During November of 1977, Widgery mailed to Robo an $108,482.40 purchase order signed by Larry Duggan as president of Sun Coast Dock & Davit Corporation. The contract allegedly bore the forged signature of Duggan and named a nonexistant corporation. On receipt of this purchase order, Robo borrowed $40,000 from the Goppert Bank. In Count IV the Government charges that Widgery committed mail fraud by mailing Duggan's purchase order to Robo.

Subsequent to mailing of Duggan's purchase order, Widgery contacted the president of Robo, allegedly by telephone, to request an advance on the Duggan sale so that Widgery might purchase an option on a car wash site. Funds were deposited to Widgery's account, but the record shows no evidence of any purchase. This alleged telephone call and the wiring of an $2,218 advance by Robo form the basis for counts V and VI of the indictment.

In October 1977, Widgery mailed a purchase order to Robo on behalf of Charles Howell, representing that Howell ordered car wash equipment in the sum of $57,203. The Government

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American-Fletcher National Bank in Indianapolis. Widgery then wrote Stone and Jefferson each a check for $3,000.

The SBA never funded this loan because of Stone's lack of credit. Widgery then applied for a SBA loan on behalf of a James Gerard. Hunter approved the Gerard loan and the Springs Valley National Bank granted Gerard interim financing based on this approval. Widgery used these proceeds to pay off the Stone loan. The SBA, however, also cancelled its authorization of the Gerard loan.

alleged that Howell signed the order in blank, never intending to purchase the equipment. Again, Robo borrowed funds from the Goppert Bank on the strength of that order. The mailing of Howell's order by Widgery forms the basis for count VII. Based on the Howell purchase order, Widgery sought an advance purportedly for Jefferson to purchase an option on a car wash site. Counts VIII and IX allege that his telephone call to the president of Robo and the wiring of an $8,580 advance constitute wire fraud.

As part of his dealings with Howell, Widgery encouraged Robo to take over Midwest Cabinet Manufacturing Company of South Bend, a business owned by Howell.[3] Based on a document evidencing Midwest's agreement to the takeover, Hunter issued a SBA loan authorization letter to Robo and Midwest.[4] Widgery mailed this authorization to Robo and that mailing forms the basis for the count X mail fraud charge.[5]

In connection with the Midwest takeover, Robo agreed to pay certain expenses of Midwest. Counts XI to XXVIII charged mail fraud regarding checks Robo mailed to Widgery for these expenses. The jury found Widgery not guilty on these eighteen counts.

II. Sufficiency Of The Evidence.

Widgery alleges that the Government's evidence failed to establish a scheme to defraud and the requisite use of the mails or wire communications. In reviewing this claim, we must view the evidence in the light most favorable to the Government and

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[3] Widgery advised Jones, the president of Robo, to take over the failing business based on Midwest's contracts with Sears, Roebuck & Co. and the United States Postal Service.

[4] The SBA lost $90,000 on a previous Midwest loan approved by Hunter.

[5] Robo used this loan agreement to obtain a $50,000 loan from the Goppert Bank.

sustain the verdict if it is supported by substantial evidence. *Glasser* v. *United States*, 315 U.S. 60, 80 (1962).

Direct evidence of intent to defraud is not required. A jury may infer intent rom all the facts and circumstances of the case. *United States* v. *Gilbertson*, 588 F.2d 584, 587 (8th Cir. 1978). In this case there was ample evidence from which a jury could reasonably infer intent to defraud. The Government's proof clearly established a pattern of fraud in mailing the bogus purchase orders of Stone, Duggan, and Howell, in obtaining a SBA loan authorization for Stone, and in requesting advance commissions on the purchase orders.[6]

Moreover, except for count V, the Government proved the requisite mailing or use of wire facilities needed to support Widgery's conviction. The Government concedes that it failed to establish the telephone call necessary to support a conviction on count V; thus, we reverse the conviction on that count.

After carefully reviewing the evidence on count X charging Widgery with mailing to Robo a fraudulent SBA authorization, we must conclude that the evidence is insufficient to support a conviction on this count. The SBA issued this authorization to Robo and Midwest based on a valid, written takeover agreement. Although both fims were financially unsound, there is no evidence that Widgery misrepresented their financial condition in the application or that Widgery misrepresented Midwest's financial condition to Robo in advising the takeover. Furthermore, after the takeover, Robo did pay, as agreed upon, certain expenses of Midwest; the jury rejected all of the

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[6] Howell and Duggan denied that they ordered car wash equipment or owned sufficient assets to purchase such equipment. Stone testified that although he told Widgery he was interested in purchasing a car wash, he also informed Widgery that he had no assets. Stone also claimed that Widgery filled out the false SBA application form. Jefferson stated that he had never received advance commissions to purchase options on car wash sites.

fraud claims relating to the payment of these expenses. Widgery's conviction on count X, therefore, cannot stand.

III. Mistrial.

Widgery also argues that the court should have declared a mistrial because of alleged jury misconduct[7] and because the jury deliberated eleven hours over a Saturday and a Sunday. We find no merit in either contention. The trial court clearly acted within its discretion in denying Widgery's motions for a mistrial.

Accordingly, we set aside Widgery's convictions on counts V and X and affirm his conviction on the remaining counts.

A true copy.

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[7] After several hours of jury deliberation, Widgery's counsel asserted that (male) juror number 6 has been "blowing kisses, winking [and] waving" to Miss Clark, as Assistant United States Attorney who assisted in the prosecution. Counsel requested a mistrial, asserting that the conduct of the juror had signaled either a guilty verdict or a hung jury to Ms. Clark. The court rejected counsel's suggestion as speculative, but did not foreclose a postverdict motion for relief on "some showing that this jury was prejudiced in some way." Appellant presented no additional evidence of jury bias in his posttrial motion.

We note initially that because counsel observed the juror's allegedly improper conduct during the trial, he properly should have called the court's attention to the alleged misconduct of the juror before the close of the trial when two alternate jurors were excused. On the record made during jury deliberations supported only by counsel's statement of his observations, we cannot say that the trial court erred in denying a mistrial.